No. 3936.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

In the Matter of
J. H. McNEICE and FRED McNEICE,
Individually and as Co-partners,
Doing Business Under the Name and
Style of McNEICE FURNITURE CO.,
Bankrupts.

DOLPH BARNETT, as Trustee of
J. H. McNEICE and FRED McNEICE,
Individually and as Co-partners, Doing
Business as McNEICE FURNITURE
COMPANY, Bankrupts,

Appellant,

vs.

O. A. SPROAL,

Appellee.

BRIEF OF APPELLEE.

GRADY, SCHUMATE & VELIKANJE,

Attorneys for Appellee.

516 Miller Bldg.,
Yakima, Wash.

REPUBLIC PUBLISHING COMPANY, YAKIMA

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STATEMENT OF THE CASE.

On July 21, 1921, an involuntary petition in bankruptcy was filed, a hearing had, and on August 13, 1921, the co-partners doing business under the name of McNeice Furniture Company were adjudicated. The co-partnership had been occupying several rooms of the ground floor of a building owned by appellee, O. A. Sproal, under a written lease providing for a rental of $375.00 per month. A meeting of the creditors was held for the purpose of electing a trustee. Mr. Sproal had filed his claim, but at the meeting of creditors the bankrupts and all creditors represented objected to his voting upon the ground that his claim was a preferred one, and he thereupon refrained from so doing. The appellant was elected trustee September 10, 1921.

Sometime previous to these proceedings the bankrupts had made an assignment to F. C. Hall for the benefit of creditors, the assignee had continued to operate the business for their benefit and continued to occupy the building covered by the lease, and after the trustee was appointed he continued to use and occupy the same premises as was

covered by the lease until the sale of the assets of the bankrupts was had Oct. 5, 1921 (R. pg. 27).

The claim of the appellee was allowed by the Referee, as follows:

Rental under the lease from June 1, 1921 to date of adjudication....	$ 907.45
Rental at a reasonable basis, as expense of administration fixed at $300 per month from adjudication to surrender of premises by trustee, October 5, 1921.....	518.30
	$1425.75

An appeal was taken from this order to the U. S. District Court, for the Eastern District of Washington, and in a written opinion by Judge Rudkin the order was modified in this:

Rent at contract rate of $375 per month from June 1, 1921 to the date of filing the petition instead of date of adjudication.....	$ 628.89
Expense of administration at $300.00 per month from July 21, 1921 to October 5, 1921.....	750.00
	$1378.89

From the order of the Court thus entered this appeal was taken.

ARGUMENT

The first contention of appellant is that the claim was a general one because the blank form used was one appropriate for unsecured claims—the kind of blank form used being the criterion rather than the character of the indebtedness. This question was not raised in the court below on appeal from the Referee, and it is a rule of quite universal application that questions not going to the jurisdiction of the court not raised in the court below will not be considered on appeal.

Secondly, this indebtedness for which the appellee makes claim is a preferred claim, a portion of it being preferred by virtue of the fact that a statutory lien exists therefore, and the other portion of it being preferred as expenses of administration. There are two classes of "secured" claims.

> (1) Those evidenced by some instrument in writing.
>
> (2) Those given preference by operation of law or some statute creating a lien.

This claim in part falls within the latter class, and all of it is a preferred claim. It was not filed as an unsecured claim, but the facts surrounding it were set forth and they govern its character.

The application of Chapter 165 of the Session Laws of 1917 of Washington (Section 1203 Rem. Comp. St., Wash.) as quoted on pages 8 and 9 of the Brief of Appellant, has not in our opinion been correctly applied by him.

In this case rental was accruing at the rate of $375.00 per month, but said contract for rental was terminated on July 21, 1921, by the filing of the Petition in Bankruptcy. This was so held by the trial court and neither party is objecting thereto. When this happened the appellee then and there became entitled to a preferred claim for two months rent. If the interpretation of the statute adopted by appellant is correct the claim of lien would have to be asserted in some manner by the appellee within two months from said date. This the appellee did by filing his claim with the Referee in Bankruptcy on the 21st day of September, 1921, (appellant states September 10, 1921), thus bringing himself within the contention that no claim could be made for any rent which had been due for more than two months. It will be seen from this that the appellee only claims rent for the month of June and for July to the date of the filing of the petition, to-wit: July 21, 1921, and has made claim for same within two months from said date.

We do not want to be understood by this as agreeing with the appellant in his interpretation of this statute as we think the provision that the lien shall not be for more than two months rent is a limitation upon the amount of the lien, and the provision that the lien shall not be for any rent which has been due for more than two months is a limitation upon the time for which it can be claimed and has nothing to do with the time of commencing the appropriate action to foreclose the same as provided by Section 2 of the lien law. We contend that this statute does not fix a time within which an action shall be commenced to foreclose the lien as is usual in lien statutes. The question of when an action should be commenced to foreclose a lien under this statute in the absence of an express provision therefor is not now before the court and for the purpose of this case is an academic one and though interesting we will not pursue it further.

We filed our claim within two months from the date of the filing of the Petition and we were allowed by the trial court a preferred claim for the unpaid rental up to the date of the filing of the Petition, which was less than rent for two months. We have been unable to find any rule of law which

required the appellee to do more than file his claim in the bankruptcy proceedings and assert his preference under the statute for such part of the rent as was owing up to the date of the filing of the Petition for not exceeding two months.

The appellant contends that he should not be chargeable with rental during the period of his occupancy of the leased premises from the time the Petition was filed. An attempt was made by the appellant to show that he had vacated a part of the premises and therefore should not be held for only the reasonable rental value of the portion he did occupy. This contention is not borne out by the evidence. A careful reading of the evidence in the record will show that the preponderance thereof is to the effect that the trustee continued to occupy and held dominion over the entire premises covered by the lease and that some of the property of the bankrupts in his charge was kept in the rooms he now contends had been vacated. No key was surrendered to the appellee and he neither had opportunity to, nor right or authority, to rent any part of the premises to anyone while the trustee was in possession. It is quite true, as stated by the trial judge in his opinion, that the trustee had probably kept the premises

longer than necessary and thereby added an unnecessary expense to the estate, but the fault is not with appellee and he should not bear the loss caused by this error in judgment.

We wish to refer to the first and second lines of the Brief of appellant on page 14, and the citations thereunder. Collier on Bankruptcy (10th Ed.) Page 881 says:

> "The trustee, however, usually retains possession for a brief period paying on a *quantum meruit* basis meanwhile."

The author cites in support of his text *in re Fraser* 183 *Fed.* 28. The text supports the view of the referee and trial court that during the time the trustee occupies the premises he must pay rental not on the basis prescribed in the lease but by what the court finds to be the reasonable value of the use thereof.

The Referee found, and his finding was sustained by the Trial Judge, that the appellant had continued in possession of the premises until October 5, 1921, and also that the reasonable rental value of the premises to be charged against the estate as expenses of administration was $300.00 per month. There is ample evidence in the record to sustain this

finding and we can see no reason why it should be disturbed by the appellate court. The appellant is in no position to claim an unjust or oppressive burden upon the estate as he, and he only, is responsible therefor. There was nothing to prevent him from vacating the premises and moving the assets of the bankrupts into less commodious and expensive quarters.

We feel in some of the remarks made by the appellant in his Brief that he has gone somewhat outside of the record, and especially with reference to rent collected from Mr. Simon, to whom the property was leased and who, took possession after the appellant vacated. There is no testimony in the record showing that Mr. Simon paid any rent for any of the period of time until he got possession October 5, upon which to base the contention of the appellant that five (5) days rent at $300.00 per month, or $50.00 should be deducted from the claim as it now stands. The record shows (R. 27) that it was not practicable to rent the front end of the store without the rear end, unless a partition was put in; furthermore, this could not be done until the trustee vacated. Mr. Simon was allowed by the trustee to store some of his goods and because on his promise.

to vacate, Mr. Simon had brought goods to Yakima, and the trustee failing to move as agreed, extended this privilege to Mr. Simon. This action on the part of the trustee did not in any way diminish his obligation to pay appellee for the use of the premises, possession of which he still retained and which he did not surrender to him.

In closing we desire to point out what is seemingly a typographical error in the record. The order modifying the order of the Referee (R. 12-13) refers in two places to July 1, 1921. The figures computed, clearly show this to be an error and that it should be July 21, 1921. This is borne out by the opinion of the trial judge (R. 14-16) wherein the date July 21, is clearly shown.

We submit that the order made by the Trial Judge in allowing the claim of the appellee is correct and should, in all respects be affirmed.

Respectfully submitted.

GRADY, SHUMATE & VELIKANJE,
Attorneys for Appellee.

Since writing the foregoing, and after the same was set up by the printer, we were favored by appellant with a copy of the decision of the Supreme Court of Washington, in the case of *Culp vs. McMehan*, decided February 10, 1923, which holds that the lien for rent provided for by the statute quoted is not enforcible unless the action therefor is brought within two months of the time the rent which it is sought to recover becomes due. With this construction of the Washington statue settled by the Supreme Court, still we contend the trial court did not err in allowing our claim as it did.

The decision refers to the case of *McDermoit vs. Tolt Land Company*, 101 Wash. 114. Our position is that as long as we chose to file our claim for rent in the bankruptcy proceedings, and that if we did so within two months from the time the rent we claim became due, the Court could allow such rent as a preferred claim. The claim was for rent for June and up to July 10th, less than two months, and was asserted by filing a claim in the bankruptcy proceedings within two months from July 10th.

In the McDermott case the court said: "The Court concluded from these facts: 1st, that the action was not commenced within the time limited by

statute; 2nd, that the plaintiffs waived their liens by filing the claims with the referee and elected thereby to have their claims satisfied from the assets of the bankrupt estate. If the court was correct in either of these conclusions the judgment must be affirmed."

The court then proceeded to sustain the judgment upon the first ground, and later in the opinion stated that by bankruptcy proceedings the claimants were not prevented from foreclosing their liens in the state court, but if they desired to do so they must commence their action within the time prescribed by statute. We can find no case where it has been held that the claimant cannot elect to file and assert his claim in the bankruptcy proceedings, and look solely to the assets of the bankrupt.

We think the law applicable to this case is that when the appellee filed his claim in the bankruptcy proceedings, and did so within two months from the time the rent he claimed therein became due, he was entitled to have such rent allowed as a preferred claim, and that although he might have maintained an action to foreclose his lien in the state court regardless of the bankruptcy proceedings, he was not obliged to do so and could elect to file his claim, with the Referee and look to the assets of the bankrupt.